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ABSTRACT

The most litigated issues involving teachers are the control of conduct of teachers and other employees. The disciplinary measures available are typically expressed or implied in state statutes. These normally include suspension, transfer, nonrenewal of contract, and discharge. The superintendent or board may be empowered to recommend the revocation of the teaching certificate by the state board of education or other agency. The statutes of most states list grounds for discharge and certificate revocation. These listings typically include such grounds as incompetency, inefficiency, insubordination, neglect of duty, and immorality. Conduct that involves the exercise of a constitutional right such as free speech invokes procedural requirements that may extend beyond those specified by statute. Cases are cited under the broad headings of insubordination, neglect of duty, and immorality and crimes involving moral turpitude. (Author/MLF)

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LEGAL CONTROLS ON TEACHER CONDUCT

by Floyd G. Delon

Introduction

Those of you who have been connected with the governance of public education for even a few years have witnessed some very dramatic changes affecting legal control. Among these changes are: (1) the recognition and protection by the courts of teachers' and students' constitutional rights; (2) the enactment of collective bargaining and procedural due process laws by state legislatures; and (3) the enactment by Congress of such provisions as Title VII, Title IX, Section 504, and 94-143 each followed by the detailed implementing regulations. At times you may feel overwhelmed by these ever increasing legal demands.

The presentation this morning will focus on the most litigated issues involving teachers--the control of conduct of teachers and other employees. The disciplinary measures available are typically expressed or implied in state statutes. These normally include suspension, transfer, nonrenewal of contract and discharge. The superintendent or board may be empowered to recommend the revocation of the teaching certificate by the state board of education or other agency.

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Reasonable Grounds

The statutes of most states list grounds for discharge and certificate revocation. These listings typically include such grounds as incompetency, inefficiency, insubordination, neglect of duty, and immorality. Even where grounds are listed, an examination of the case law is necessary to gain some idea of types of conduct that may reasonably be controlled.

Before examining the specific grounds in detail, we should stress that conduct which involves the exercise of a constitutional right such as free speech invokes procedural requirements which may extend beyond those specified by statute. From the Doyle[1] case, decided by the United States Supreme Court this year, we know that public employees cannot avoid the consequences of their misconduct by simply exercising a constitutional right.

The United States Supreme Court also rendered decisions in 1976 and 1977 that clarify the types of reasons that may infringe on the protected "liberty" interest of the Fourteenth Amendment.[2] Such liberty interests of the employee require formal due process procedures for nonrenewal of contract and even transfer of personnel. However, unless those reasons are publicized and stigmatize the employee or prevent comparable employment elsewhere procedures beyond those specified by statute are not required.

1. Insubordination. The most frequently cited reason for disciplining teachers is insubordination. Such charges are usually made in response to violations of administrative directives or board rules.

Administrator/teacher conflicts. An Arkansas coach became uncooperative after he was passed over for the athletic director's position. As conditions

deteriorated, the board chose not to renew his contract. The court described the situation thusly:

> It is a sad story. But it is the type of problem that confronts school boards unfortunately on not infrequent occasions - - the type that totally involves the entire school community. This particular school community has finally resolved the problem. It cannot be said that it did so in an unfair or arbitrary manner.[3]

According to the opinion, "there was substantial evidence for which the board could find that he was insubordinate." On appeal the Eight Circuit Court affirmed the decision, rejecting the coach's claim that the board was not an impartial tribunal.[4]

A word of caution on this point is in order. In a 1977 case, the Tenth Circuit Court did agree that the board that dismissed a superintendent for insubordination was not an impartial tribunal as required by due process. Board members had made public statements prior to their election concerning their intention to fire him.[5]

In a recent Ninth Circuit Court Decision, Bernasconi v. Tempe Elementary School District,[6] a school counselor claimed that the reason for her transfer was her criticism of the special education program and her advising of Mexican-American students, whom she claimed were being erroneously placed in classes for mentally retarded based on tests administered in English rather than Spanish. She had suggested that parents contact the legal aid society. The

school board contended that the transfer was necessitated by a cut in funding and the position was being abolished. The school district further argued that even if the court found that the transfer resulted in part from the exercise of the counselor First Amendment rights, there was no loss of a valuable governmental benefit.

The court disagreed, saying:

> "The transfer of Bernasconi from a position uniquely suited to her talents and desires is precisely the kind of action provided by Perry."

The case was remanded to the lower court for a determination as to whether the board would have reached the same decision to transfer absent the protested conduct.

Residency Policies. Insubordination is frequently the charge against teachers and administrators who defy board regulations requiring them to live in the district. Although as recently as 1973, a federal district court struck down the Kansas City, Kansas board residency policy,[7] most of the decisions of the past few years have gone the other way.

Residency policies that are supported by a "rational basis" seem likely to survive judicial scrutiny.[8] For example, the Sixth Circuit upheld the Cincinnati school district requirement, accepting its contention that:[9]

1. the requirement aids in hiring teachers who are highly motivated and deeply committed to urban education;
2. teachers who live in the district are more likely to vote for district taxes, less likely to engage in illegal strikes, and more likely to help obtain passage of school tax levies;

3. .....more likely to be involved in school and community activities;
4. ....more likely to gain sympathy and understanding for the racial, social, economic, and urban problems; and
5. the requirement is in keeping with the goal of encouraging integration.

The lack of difficulty on the part of the courts in finding a rational basis is further evidenced by the Tenth Circuit Court's 1976 decision, Mogle v. Sevier County School District.[10] The residency policy here was upheld even though the court recognized that the supporting rational basis of availability, community involvement, and access to school records was probably delineated only after it was contested by a counselor whose contract was not renewed.

Corporal Punishment Rules. The United States Supreme Court in it's Ingraham[11] decision reaffirmed the authority of the state to permit and regulate the use of corporal punishment. Recent state court decisions sustain the authority to dismiss for insubordination teachers who violate corporal punishment regulations.

An Illinois school board policy permits teachers to discipline students for disobedience or misconduct only.[12] The policy requires that corporal punishment be administered in the presence of another adult and that an explanation be given to the student as to why he was punished. The punishment may not exceed what is reasonable and moderate under the circumstances nor be disproportionate to the offense. Teachers must observe a "cooling off" period between the offense and the punishment.

In this case, the teacher paddled an eleven-year old boy for playing his radio during the lunch period in violation of the teacher's rule. As he was walking down the hall shortly thereafter, his younger brother came up and asked if the paddling hurt. He replied that it stung. The teacher asked what had been said, then saying "we'll make it hurt" again paddled the boy. The boy's mother examined the boy when he returned home. His buttocks was "beet" red and bruises appeared the following day. No school was missed and the family physician indicated that no significant damage had been done.

The board, acting on the basis of the clear violation of its policy, dismissed the teacher. The court held that the board had acted within its authority.

Choice of Teaching Materials and Methods. When school boards adopt and enforce rules relative to the choice of teaching materials and methods, teachers frequently claim violation of academic freedom and First Amendment rights. A Colorado board disapproved the use of ten books and issued a memo providing that the books "will not be purchased, nor used for class assignment, nor will an individual be given credit for reading any of these books". The federal district court in Carey v. Board of Education [13] said that academic freedom was not a constitutional right but that open communication which is a part of academic freedom was protected by the First Amendment. The court, however, looked beyond the First Amendment right of the teacher to open communication. Through a collective-bargaining agreement, the teachers surrendered their individual freedom by allowing the board to establish material lists and requiring prior approval for use of material not on the list.

In New York after parental objections, the superintendent and principal talked to the teacher and secured his agreement not to use the book, Catcher in

the Rye.[14] Later, however, the teacher allegedly restored it to the curriculum. The board dismissed the teacher for insubordination based on this conduct and his walking out of a conference with the principal and refusing to return. The lower court returned the matter to the board to consider another penalty short of dismissal but on appeal New York's highest state court held that the evidence presented by the board sufficiently supported the dismissal for insubordination. As this case and the Carey case illustate, the violation of an agreement with the board or administrators appears to waive First Amendment protections associated with academic freedom.

As we have suggested previously, academic freedom and First Amendment rights will not protect the job status of teachers who may legally be dismissed for other reasons. Teachers who alleged that their contracts were not renewed because of such activities as playing records of Hair and Alice's Resturant and discussing Vietnam, political mottos, drugs, and hippies failed to prove that this was the real reason. The Tenth Circuit Court found that the evidence supported the board's list of charges that included insubordination and causing disharmony among the faculty.[15]

Personal Appearance Regulations. In 1976, the Supreme Court ruled on the constitutionality of a grooming regulation in Kelly v. Johnson.[16] The regulation, applicable to male police officers, "was directed at style and length of hair, sideburns, and mustaches . . . ." Justice Rehnquist's majority opinion indicated that the enactment of the regulation was not so irrational that it could be considered a deprivation of the officer's "liberty" interest to choose his hairstyle.

The First Circuit Court relied in part on this case in sustaining the nonrenewal of a teacher's contract for reasons of dress.[17] The teacher contended that the sole reason for her dismissal was her dress length or in the words of the court "over exposure". The court stated that even if this were true, it's

its's intervention was not warranted. As one of my students described it: "The court refused to raise skirt lengths to a consitutional issue."

2. Neglect of Duty. Disciplinary sanctions against teachers for neglect of duty are usually successful when proper procedures are followed and sufficient evidence is presented. In 1975, a Louisiana board dismissed a principal who left school one week early to register for summer classes.[18] The testimony was conflicting, with the principal asserting that he had discussed being away with the superintendent and had received his permission, whereas the superintendent maintained that he had learned of the absence only after he visited the school. The superintendent further testified that he had to assume the principal's duites of signing checks and supervising National Youth Corps students. In the hearing, the board chose to believe the superintendent. The court ruled that the board had not exercised its discretion arbitrarily or unreasonably.

3. Immorality and Crimes Involving Moral Turpitude. Standards of morality differ from community to community and change from year to year. For this reason, caution must be used in attempting to specify what conduct currently represents "immorality," especially that sufficient to justify the dismissal of a teacher or revocation of the teaching certificate.

Homosexual conduct. Until recently there appeared to be growing acceptance throughout the country of the principles expressed by the California courts in the Sarac[19] and Morrison[20] cases. First, public homosexual conduct and especially that proscribed by state statute was accepted as prima facie evidence of unfitness to teach and therefore sufficient ground for disciplinary action. Second, private homosexual conduct could not serve as a basis for such discipline unless an adverse impact on the school community could be shown.

This year in the Jack M.[21] case the California Supreme Court concluded that a tenured elementary teacher arrested for homosexual solicitation and self-exposure in a public restroom was not "unfit or unfit per se." The court accepted the trial court's reliance on the expert testimony of a psychiatrist that the isolated instance described did not establish homosexuality, nor suggest recurrence or danger to pupils or associates. Thus, the California court appears to have discarded it's previous assumption that public homosexual conduct alone established unfitness.

On the other hand, the Washington Supreme Court affirmed a trial court finding that homosexuality constitutes immorality.[22] The court had accepted the board's findings of fact:

1. (The teacher's) homosexuality was a fact constituting immorality
2. ...his homosexuality was a disorder for which he sought no relief.
3. ...hence, voluntary
4. ...other teachers in the school testified that they objected to his presence there
5. ...impairment of (his) ability to meet the requirement to teach morality
6. ...danger of student emulation or approval
7. ...unreasonableness of expecting administrators to wait for overt manifestations of homosexuality

Since certiorari was denied by the United States Supreme Court, a clarification of the employment rights of homosexuals does not appear to be in the offing

and conflicting positions among different jurisdictions will continue to exist.

Heterosexual Relationships. The school board may justifiably discipline a teacher whose heterosexual conduct adversely affects the school community. In a 1975 Nebraska case the courts considered a civil rights action brought by a teacher against individual board members.[23]

The school board employed the teacher to teach nine students enrolled in grades one through four in a South Dakota community. The teacher lived in a mobile home furnished by the school district. She began her teaching duties in August, 1974. In October of that same year her boyfriend from her home city of New York came to visit her. They continued to live together until her discharge in late November. The members of the community soon became aware of this living arrangement.

The discharge came after protests were lodged by the parents of children attending the school and others. School officials attempted to resolve the problem informally but the teacher refused to alter her living arrangement. The board, then, gave notice of a hearing on the school superintendent's recommendation that she be dismissed for "gross immorality and incompetency as the immoral conduct affects the teacher's competency to teach." During the hearing, the board asked on several occasions whether she would be willing to have her boyfriend live elsewhere but she responded negatively. Finally, the board adopted the dismissal resolution relying on incompetency rather than gross immorality as the grounds. The teacher challenged the dismissal with a civil rights action against the board and its members.

The Eighth Circuit Court applied the Wood v. Strickland[24] guidelines to the present case. The court found that the board met those good-faith standards by (1) acting without malice, (2) balancing the constitutional rights of the teacher against the interests of the school community and (3) not depriving the

teacher of constitutional rights that were "settled" and "undisputed" in law. The court upheld the decision supporting the action of the board but remanded the case so that the record could be changed to indicate that the denial of relief was based on "failure to establish a claim for damages ... to serve to avoid or lessen any stigma which may attach to her teaching record.

More recently, a federal district court in Delaware upheld the dismissal of an Assistant Superintendent on grounds of immorality and neglect of duty.[25] The charges grew out of an affair the plaintiff had carried on for a year and a half with a married woman. The couple met three or four times per week during working hours. Subordinates noticed his frequent absences and his lack of attentiveness to responsibility. One of the teachers lent his apartment for their convenience and he confided to another that he was conducting a sexual relationship during working hours. When the woman and her husband moved to Georgia he placed lengthy telephone calls to her during working hours. After the husband was transferred to Pennsylvania, the Assistant Superintendent persuaded her to leave her husband and return to Delaware.

The relationship adversely affected attendance at professional meetings. At one such conference, in which she accompanied him, the plaintiff spent little more than an hour in meetings. On another occasion, he was sent to the AASA convention in Atlantic City but left the meeting to visit his lover, then in Pennsylvania.

On two occasions he sent nude photographs of the woman to her husband. First, after the move to Georgia, he attempted to blackmail the husband into permitting his wife to remain in Delaware by threatening to send a copy of the photograph to his employer. Later the plaintiff sent another photograph with the message: "Please don't make trouble, just go."

The court concluded that these facts sufficiently supported both charges, rejecting the plaintiff's argument that there was no "rational relationship" between his conduct and his job performance. The court found it unnecessary to rule on whether adultry was adequate basis for termination.

In another 1977 case, Boyette v. State of Florida Professional Practices Council,[26] a high school physical education teacher contested the revocation of his teaching certificate for "forcibly raping" another teacher. The appellant had invited an unmarried female teacher to his trailer where they dined. Afterwards they began kissing on the couch. The female teacher claimed that Boyette had forcibly taken her to the bedroom where they had intercourse. He claimed that while he had been "persistent" he had not been "forcible". She testified that he pulled her off the couch when she resisted he became more hostile and aggressive. She conceded, however, that he did not threaten her verbally or with a weapon. After this portion of the incident, the girl called her roommate but said nothing about what happened. After the phone call they again had intercourse. After she returned home, she then told her roommate of the incident.

In suppressing the revocation order, the court held that it "was not supported by competent evidence." The allegations were not made until October although the incident had occurred in December of the previous year and it was known in the community only after the council began its investigation. This decision is consistent with the Erb[27] ruling in Iowa in which that state's supreme court overturned a certificate revocation for immorality based on an adultrous relationship. The effect on job performance, the duration of the conduct and the likelihood of recurrence appear to be important determinants.

Teacher/student relationships. The courts have consistently supported the disciplinary acts of school boards taken in response to improper relationships between teachers and students. Two recent cases illustate this point.

A Colorado teacher was dismissed for immorality because of his conduct on a field trip with minor female students. While riding in the rear seat of a van being driven by one of the adult chaperones he engaged in activities he described as "good-natured horse play" which consisted of tickling the girls on various parts of their bodies. The girls reciprocated in this conduct. The language used was occasionally vulgar and contained many sexual innuendos. Later on during the trip in violation of the "lights out" rule, the teacher spent some time alone in the van with one of the students discussing her personal problems. On another occasion he was seen in a motel room lying on the bed with a female student watching television.

The state supreme court rejected the teacher's argument that immorality as a ground for dismissal is unconstitutionally vague and that his actions could not serve as a basis for dismissal unless the board showed an adverse effect on his ability to teach.[28] On this latter point the court said, "In our view, whenever a male teacher engages in sexually provocative or exploitive conduct with his minor female pupils, a strong presumption of unfitness arises against the teacher."

Similarly, in Obermeyer v. School Board of Independent School District No. 282,[29] the Minnesota Supreme Court upheld the dismissal of a teacher for immoral conduct after he had admitted and was convicted of taking liberties with a minor male student. The teacher attempted to rely on a Minnesota statutory disability provision which would have provided leave for treatment of his alcholism - allegedly a cause of the misconduct. The court ruled that the statute does not preclude the application of the other statutory provision authorizing dismissal for immorality.

Other Immorality Infractions. Teacher conduct other than the types previously discussed may also be viewed by school authorities (and often the courts) as immoral.

The Chicago Tribune of November 20 reported a case involving a high school biology teacher who invested $2,000 and helped publish a "Phornographic" magazine. This magazine was designed to cater to those who get sexual gratification from seeing naked women bound and whipped. The school officials learned of the activities through an anonymous letter attached to copies of photos from the magazine showing the teacher standing next to a bare breasted woman later identified as his wife.

After his dismissal, the teacher sued charging violation of his First Amendment rights. The federal district court rejected this contention and the case is now on appeal to the Seventh Circuit Court.

Dismissals for immorality are not limited to sex-related offences. For example, in Baker v. School District of Allentown,[30] a teacher was discharged after pleading nolo contendere to a charge of running an illegal gambling operation. The teacher argued that such a plea did not represent sufficient evidence. In ruling for the board the court found substance to its claim that the moral standards of the community had been offended.

Finally, a Florida teacher petition for certiorari seeking a review of the revocation of her teaching certificate which the State Board of Public Instruction had revoked on the ground "act involving moral turpitude".[31] In denying the petition, the court said that the charge was sufficiently supported by the teacher's plea of guilty to manslaughter after killing her husband with a shotgun.

Conclusion

The consequences of improperly controlling teacher conduct (as I am sure most of you are aware) can lead to injunctive relief such as reinstatement of the teacher and even damage awards against board members and administrators. A recent example of such remedies is the order a Missouri federal district court issued in December, 1977. The plaintiffs, three teachers, were able to establish to the satisfaction of a jury that the board decided not to renew their contracts because of their activities in the Missouri National Education Association and their appearance in public meetings to raise questions concerning certain school board policies. This action by the board violated First Amendment rights of speech and association and furthermore their Fourteenth Amendent due process rights since no hearing was accorded. The court accepted the jury's verdict and its recommended assessment of damages totalling $7500 against the four board members voting for the non-renewals. The court further ordered reinstatement and the sum of $1,250 attorney fees assessed against the defendants.

Fortunately, rulings such as this are exceptions. (This is the first damage award against individual board members in Missouri) Hopefully the reason is that school officials are acting properly in exercising control over teacher conduct.

To avoid improper action, superintendents should work with their boards to seek answers to five very basic questions before moving against an employee.

1. Does the conduct interfere with the operation of the school or harm the school community?

2. Can the conduct reasonably be assumed to coincide with grounds listed in state statutes (or board policies)?
3. Does the conduct warrant disciplinary action regardless of the race, sex, national origin, etc. of the employee?
4. Is the conduct an exercise of a fundamental right, i.e. an express constitutional right?
5. If the conduct is publicly cited as reason for the disciplinary action, will it stigmatize the employee and foreclose opportunity for future employment.

An analysis of the situation in light of these questions points the way to subsequent action, e.g. dropping the matter, seeking legal counsel, taking appropriate action consistent with statutory and constitutional procedural requirements.

As our discussion has shown the legal authority still exists to control detrimental teacher conduct.

As Mr. Chief Justice Burger said in the Hortonville decision upholding the board's authority to dismiss teachers who engaged in an illegal strike:

> Permitting the board to make the decision at issue here preserves its control over school district affairs, leaves the balance of power in labor relations where the state legislature struck it, and assures that the decision whether to dismiss the teacher will be exercised by the body responsible for that decision under the state law.[28]

This statement reflects the spirit and essence of so many of the recent decisions on teacher conduct. In this area, at least board members and administrators have cause for optimism.

Cases in Order of Review

1. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle 97 S. Ct. 567 (1977).
2. Bishop v. Wood, 426 U.S. 341 (1976) and Codd v. Velger, 429 U.S. 624 (1977).
3. Williams v. Day, 412 F. Supp 336,338 (E.D. Ark 1976).
4. Williams v. Day, 553 F. 2d 1160 (8th Cir. 1977).
5. Staton v. Mayes, 552 F. 2d 908 (10th Cir. 1977).
6. Bernasconi v. Tempe Elementary School Dist., 548 F. 2d 867 (9th Cir. 1977).
7. Hanson v. Unified School Dist. Wyandotte Cty. 364 F. Supp. 330 (D. Kan. 1973)
8. McCarthy v. Philadelphia Civil Service Comm'n., 424 U.S. 645 (1976).
9. Wardwell v. Board of Educ. of City School Dist. of Cincinnati, 529 F. 2d 625 (6th Cir. 1976).
10. Mogle v. Sevier Cty. School Dist., 540 F. 2d 478 (10th Cir. 1976).
11. Ingraham v. Wright, 97 S. Ct. 1401 (1977).
12. Welch v. Board of Educ. of Bement Comm. Unit School, 358 N.E. 2d 1964 (Ill. App. 1977).
13. Carey v. Board of Educ., 427 F. Supp 945 (D. Colo. 1977).
14. Harris v. Mechaniville Central School Dist., 395 N.Y.S. 2d 302 (N.Y. 1977).
15. Adams v. Campbell Cty. School Dist. 511 F. 2d 1242 (10th Cir. 1975).
16. Kelly v. Johnson, 96 S. Ct. 1440 (1976).
17. Tardif v. Quinn, 545 F. 2d 761 (1st Cir. 1976).
18. Howell v. Winn Parish School Bd., 321 So. 2d, 420 (La. 1975).
19. Sarac v. State Board of Educ., 249 Cal. App. 2d 58, 57 Cal. Rptr. 69 (1967).
20. Morrison v. State Board of Educ. 1 Cal. 3d 214, 82 Cal. Rptr. 175, 461 P2d 375 (1969).
21. Board of Education of Long Beach Unified School Dist. of Los Angeles Cty. v. Jack M., 139 Cal. Rptr. 700, 566 P.2d 602 (1977).

22. Gaylord v. Tacoma School Dist. No. 10, 88 Wash. 2 d 286 559 P. 2d 1340 (1977) Cert. denied, 46 U.S.L.W. 3072 (1977).

23. Sullivan v. Meade Cty. Indep. School Dist. No. 101, 530 F. 2d 799 (8th Cir. 1976).

24. Wood v. Strickland, 420 U.S. 308 (1975).

25. Sedule v. The Capital School Dist., 425 F. Supp 552 (D. Del. 1976).

26. Boyette v. State of Florida Professional Practices Council, 346 So. 2d 598 (Fla. App. 1977).

27. Erb. v. Iowa State Bd. of Pub. Instr., 216 N.W. 2d 339 (1974).

28. Weisman v. Board of Educ. of Jefferson Cty. School Dist., 547 P. 2d 1267 (Colo. 1976).

29. Obermeyer v. School Bd. of Indep. School Dist. No. 282, 247 N.W. 2d 919, rehearing 251 N.W. 2d 707 (Minn. 1977).

30. Baker v. School Dist. of the City of Allentown, 371 A. 2d 1028 (Pa. Cmwlth 1977).

31. Kiner v. State Bd. of Educ., 344 So. 2d 656 (Fla. App. 1977).

32. Greminger v. Seaborne, No. 76-401 C (1), December 1, 1977 (E.D. Mo.).

33. Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n., 96 S. Ct. 2308 (1976).